Filed 6/4/19 In re D.C. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re D.C., a Person Coming Under the Juvenile Court Law.	B289178 (Los Angeles County Super. Ct. No. CK91933)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. SHEILA M., Defendant and Appellant.	

APPEAL from an order of the Superior Court for Los Angeles County, Steff R. Padilla, Commissioner. Affirmed.

Stephanie M. Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Patricia G. Bell, under appointment by the Court of Appeal, for Minor.

Appellant Sheila M. (Mother), the mother of D.C. (D.), appeals the juvenile court's order changing the visitation between D. and his father, L.C. (Father), from monitored to unmonitored.[1] When the court issued the order, D. had been refusing for many months to have visits with Father in any setting and refusing to participate in conjoint therapy. The court modified the visitation order in an attempt to break the stalemate and mend a relationship broken by DCFS intervention. For the reasons discussed, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *2012 Proceedings*

In February 2012, D., then five, was interviewed by police officers after Mother raised an allegation of sexual abuse. He said Father had molested him by putting his penis in D.'s mouth. Mother and Father were in the midst of a custody battle, and D.'s own court-appointed family law lawyer and the commissioner presiding over the family law case believed that Mother was coaching him. Law enforcement officials reached the same conclusion, and they found Mother had a history of making unfounded allegations of abuse, including sexual abuse.

That same month, a petition was filed under Welfare and Institutions Code section 300, subdivision (b), stating that there were "allegations of sex abuse and coaching" which placed D. "at risk of harm."[2] The petition was dismissed in May 2012, and D. was released to both parents. The parties subsequently agreed to joint custody.

B. *Current Proceedings*

In March 2016, when D. was nine, Mother claimed that he told her Father was regularly touching his penis, and had been doing so since he was

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[1] The Department of Children and Family (DCFS) filed no brief. The attorney for the minor filed a brief in support of the court's order granting Father unmonitored visitation.

[2] Undesignated statutory references are to the Welfare and Institutions Code.

four or five. Mother further claimed that Father regularly hit D. with a ruler and locked him in a closet. D. was again interviewed by police officers and said that Father had sodomized him on one occasion, when D. was four, and had threatened to kill him with a rifle if he told anyone. D. told the officer he was afraid of Father and did not like visiting him.

Father was interviewed by a caseworker, and denied the allegations, pointing out that Mother had made similar allegations multiple times in the past during the parties' custody battle. The caseworker confirmed that similar allegations had been made in the past, coinciding with family law court dates. The caseworker reviewed Mother's past claims of sexual abuse, all of which had been closed as inconclusive. The investigation also revealed other false allegations by Mother against Father over the years, including that he had failed to obtain medical care for the child, when D. was not sick, and that he had failed to give the child pinworm medication, when D. had no evidence of pinworms.

The caseworker interviewed D. while he was visiting Father. D. denied the allegations. He said he liked spending time with Father because they went to museums and played games and Father always spoke nicely to him, even when he was in trouble. He further stated he felt safe in the homes of both Mother and Father and was not afraid of anyone.[3] A few days later, however, when re-interviewed while staying with Mother, D. reiterated the allegations of abuse. Nonetheless, D. continued to state he was not afraid of Father. In May 2016, DCFS filed a petition under section 300, subdivisions (a), (b) and (d), alleging that Father abused D. sexually and physically, threatened him and locked him in a closet. Father agreed to monitored visits.

In April 2016, when questioned by a forensic interviewer, D. repeated his allegations of abuse by Father. The interviewer questioned whether D. was being truthful, as his account of the alleged incidents lacked detail, and the interviewer expressed concern that D. was being coached. In a third interview with the caseworker, D. repeated his allegations against Father.

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[3] Paternal relatives reported that during D.'s visits with Father, they took the boy to sporting events, church, birthday dinners and amusement parks. He had his own bedroom in his paternal grandparents' home.

In June 2016, the parties agreed to strike the existing jurisdictional allegations from the petition and insert the following: "[Mother and Father] remain involved in a lengthy and acrimonious custody dispute over the child, which has resulted in the child being afraid of his father, because the child believes that his father has sexually and physically abused him in the past. Prior intervention by the Court and [DCFS] has been ineffective in correcting the family's extreme dysfunctionality. Such inappropriate conduct by the parents places the child . . . at risk of physical and emotional harm." Mother and Father waived their right to contest the petition as amended, and the court sustained it, finding that it supported jurisdiction under section 300, subdivision (b). The court-ordered dispositional plan included individual counseling and conjoint counseling with D., separately for each parent, "when appropriate." Father was to have monitored visits only. Mother retained custody and was provided family maintenance services.[4]

By the time of the jurisdictional report, D. had made clear he did not wish to visit Father. He started therapy in October 2016, and reported to his therapist that he did not want to see Father. From June 2016 to the first review hearing in December 2016, there were no visits. Father expressed concern that Mother was encouraging D. to be afraid of him. DCFS recommended continuing jurisdiction to reestablish a connection between D. and Father.

In January 2017, the court instructed the parents to meet individually with D.'s therapist and issued an order stating that conjoint therapy between D. and Father was to "begin immediately," and that it was to occur "hopefully once a week." However, D.'s therapist, Nivia Van Damme, told Father that neither she nor DCFS could force D. to see him, and no conjoint sessions were scheduled.

In February 2017, Mother filed a section 388 petition, seeking reconsideration of the jurisdictional order and to set aside her waiver of her right to contest it, stating Father had been dating the caseworker, Stephanie

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[4] D. was found to be an Indian child within the meaning of the Indian Child Welfare Act (ICWA) by the Muscogee Creek Nation, but as he has never been removed from Mother's custody, no ICWA issues are or could be raised in this appeal.

Carpenter, who had been involved in investigating the 2012 matter. D.'s counsel opposed. The court denied Mother's request, finding she knew about the relationship when she waived her right to contest the petition.[5] However, the petition led DCFS to request Riverside County DCFS to review the matter and prepare an independent report.

In June 2017, the court ordered DCFS to provide a conjoint therapist separate from D.'s individual therapist, and to prepare a schedule for conjoint therapy between D. and Father.[6] D. and Father had a single conjoint counseling session in October 2017. During the session, D. was "visibly uncomfortable." He refused to attend any more sessions.

In October 2017, Riverside County DCFS submitted its report after conducting an independent investigation. It recommended D's return to his parents' joint custody as the ultimate goal. The report also stated: "Returning [D.] to [Father's] care may not be appropriate at this time as the child reportedly had difficulty engaging with [Father] during their conjoint therapy visit . . . , and [Father] and child have not had the opportunity to benefit from their conjoint therapy." The report recommended that the court retain jurisdiction in order to provide reunification services for Father, including counseling and conjoint counseling, and that the court "authorize the return of [D.] to [Father's] care with services in place, prior to the next Status Review Hearing and upon progress with the Case Plan, if deemed appropriate by the Los Angeles County [DCFS]." It recommended that the court order DCFS to transport D. to and from conjoint therapy session with Father "in order to eliminate any potential factors that may impede [D.'s] willingness to actively participate in weekly conjoint therapy with [Father]."

In November 2017, DCFS reported that since May 2017, D. had been prescribed and was taking various anti-depressants and a sleep aid. At the November 1 hearing, the court found that conditions existed justifying continued assertion of jurisdiction. The court amended the case plan to require weekly conjoint counseling between D. and Father and trauma-

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[5] Carpenter was not involved in the underlying proceedings.

[6] That same month, Pamela Haddad became D.'s individual therapist.

focused cognitive behavioral therapy for D. It instructed DCFS to transport D. to conjoint therapy with Father.

In December 2017, Father filed a section 388 petition seeking to have D. placed with him. D., who had turned 11, continued to state he wanted to live with Mother and continued to refuse to see Father, even in therapy. The caseworker recommended denial of Father's petition and termination of jurisdiction, as he believed there was nothing further DCFS could do, and Mother had expressed a willingness to allow Father to have contact with D. whenever D. was ready. D.'s therapist Haddad wrote a letter explaining that D. presented with signs of post-traumatic stress disorder, including flashbacks, hypervigilance, irritability, stomach aches, nausea, dizziness, anxiety and night terrors, and was suffering from attachment disorder due to "interruptions in his relationship with his parents." She believed, however, he should not be forced to engage with Father and that at that point, conjoint therapy would do more harm than good.

At the February 1, 2018 hearing on Father's petition, Haddad acknowledged that she had received information about the case from Mother, but had never spoken with Father. She stated D. believed Father had abused him and continued to be fearful of him. She expressed the opinion that closing the case and allowing a "pause" in D.'s relationship with Father would allow D. to "heal." She acknowledged, however, that it was rare for a child who believed he or she had been sexually abused to be reunited with the allegedly offending parent, and she could not guarantee D. would ever be reunified with Father. She also opined that the boy would suffer long-term harm if his custody were transferred from Mother, as he already suffered from an attachment disorder. Basing his opinion on the opinion of Haddad, the caseworker testified he did not believe it would be appropriate to force the boy to attend conjoint therapy. The caseworker did not know what could be done to facilitate the father-son relationship, other than continuing to try to coax D. to attend conjoint therapy sessions.

After the witnesses had testified, Father's counsel argued that Mother's influence was keeping D. from attending conjoint counseling and reunifying with Father, and that D. needed to be "removed from [Mother] so that he can have an unbiased opportunity to recover from what's going on between his

parents." Counsel contended that D. should be placed with Father or with a neutral party. Mother's counsel argued the court should follow the therapist's advice and leave D. in Mother's custody. D.'s counsel, while acknowledging that D. had been "pretty plain speaking in that he wishes to stay with [Mother]," and that he would "suffer harm if [custody] changes," contended that D. was also "suffering harm where he is." DCFS's counsel opposed the petition, arguing that "removing [D.] from a home where he's stable" would be worse than "depriving him [of] the relationship with [Father]."

The court denied Father's request for custody of D., finding it would not be in the boy's best interests. At the hearing, the court explained that removing him from Mother, "the only parent at this time he has a relationship with," would be "devastating" for D., possibly "for the rest of his life," due to his attachment disorder. Concluding, however, that something had to change because things had "gotten worse, not better for [D.]," the court changed Father's visitation from monitored to unmonitored, expressing the belief that Father and D's relationship might improve if they were able to enjoy time together outside Mother's presence, with no one "watching over [them]." Mother appealed.[7]

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[7] At the next hearing on April 2, 2018, DCFS repeated its recommendation that jurisdiction be terminated, leaving Mother with sole legal and physical custody. Mother's counsel agreed. D.'s attorney disagreed, arguing the case should not be closed while D. was intent on not seeing Father, and contended that the custody arrangement was causing the child harm. Father's counsel argued in favor of the court's retaining jurisdiction. She observed that D.'s situation had deteriorated from the beginning of the case, and contended the matter should remain open until progress toward healing was made. The court ordered jurisdiction to continue, explaining that D. was "getting worse psychologically" and was "in peril," and that if jurisdiction were terminated "Father will never have a relationship with the child."

Mother's appeal encompassed both the visitation order and the order continuing jurisdiction. While the appeal was pending, the juvenile court terminated jurisdiction, and this court dismissed that portion of the appeal.

DISCUSSION

Before we discuss Mother's contention that the juvenile court abused its discretion in giving Father unmonitored visitation, we address respondent's contention that Mother forfeited the issue by failing to raise it at the hearing. "[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected," and "[d]ependency matters are not exempt from this rule." (*Ibid.*) But the party must have had "a meaningful opportunity to object." (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-888, fn. 7.) Although Father's petition did not request a change in the visitation order, Mother's counsel argued in opposing it that the court should act in accordance with Haddad's opinion and keep Father and D. apart until D. was ready for a reconciliation. This was sufficient to make clear Mother's opposition to providing Father unmonitored visitation. When the court announced its decision near the end of the hearing, it provided the parties no additional opportunity for argument to specifically address the visitation issue. Under these circumstances, the issue was not forfeited.

We also address the burden of proof and standard of review. Mother contends that it was Father's burden to prove a change in circumstances and that the requested change was in the minor's best interest. This is indeed the burden placed on a petitioner seeking to modify a court order under section 388. (See, e.g.,. *In re D.B.* (2013) 217 Cal.App.4th 1080, 1089.) Here, however, the court acted under section 385, which permits the court to "change[], modif[y], or set aside" any of its previous orders on its own motion. (See *Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 116 (*Nickolas F.*) ["[T]he juvenile court . . . has the authority pursuant to section 385 to change, modify or set aside its prior orders sua sponte. [Citations.] Under this section, the juvenile court may modify an order that contains a clerical error, but may also reconsider the substance of a previous order the court considers to have been erroneously, inadvertently or improvidently granted. [Citations.]"].) "The juvenile court's authority to modify a previous order that the court independently recognizes as having been erroneously, inadvertently

or improvidently made is not contingent on a party seeking a modification pursuant to section 388." (*Id*. at pp. 98-99; accord, *In re Ray M.* (2016) 6 Cal.App.5th 1038, 1053-1054.)

"Whether an order should be modified rests within the sound discretion of the juvenile court. Its decision will not be disturbed on appeal absent a clear abuse of discretion. [Citation.]" (*Nickolas F.*, *supra*, 144 Cal.App.4th at pp. 118-119; see also *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319 [appellate court reviews custody determinations made in dependency proceeding for abuse of discretion].) In applying the abuse of discretion standard, we give "a very high degree of deference to the decision of the juvenile court." (*In re J.N.* (2006) 138 Cal.App.4th 450, 459.) "'The appropriate test . . . is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" (*In re Stephanie M.*, at pp. 318-319.)

Citing Haddad's and the caseworker's testimony, Mother contends that "all the professionals" believed that contact of any kind between Father was not in D.'s best interest. That is not so. Haddad was never specifically asked whether unmonitored visitation would be detrimental, and never took a position on it. The Riverside DCFS conducted an independent review of the facts and recommended that D. be returned to joint parental custody. D.'s own attorney objected to any plan in which jurisdiction was terminated while D. and Father were estranged. In addition, D.'s appellate counsel objects to reversal of the court's visitation order, pointing out that there have now been multiple proceedings in which the sexual abuse allegations have been found to be false, and that one court also found D. had been coached to falsely allege sexual abuse. Moreover, even were the professionals aligned, appellate courts have consistently held that "[t]he power to determine the right and extent of visitation by a noncustodial parent in a dependency case resides with the court and may not be delegated to nonjudicial officials or private parties," including DCFS or the minor's therapist. (*In re T.H.* (2010) 190 Cal.App.4th 1119, 1123; *In re Korbin Z.* (2016) 3 Cal.App.5th 511, 516-517; *In re S.H.* (2003) 111 Cal.App.4th 310, 317-318; *In re Donnovan J.* (1997) 58 Cal.App.4th 1474, 1477-1478.)

Here, the evidence established that D. had enjoyed a warm relationship with both parents until DCFS intervened, reviving D.'s memory of a stale allegation that had already been found untrue. The court in the underlying proceedings also rejected the contention that Father had abused D., sexually or otherwise, and focused on improving their relationship. Nonetheless, D. wanted no contact with Father, even in monitored and completely safe settings. Haddad expressed the opinion that a period of complete separation might result in reconciliation, but conceded there was no guarantee her approach would be successful. Father and D. had been separated for some time by the February 2018 hearing, with no sign of improvement in D.'s attitude. His emotional state was measurably worse than when jurisdiction was initiated, and the court had seen the results of allowing D. and his therapist to set the agenda for visitation. Its conclusion that allowing the boy to meet with Father in the informal setting of unmonitored visitation could break the stalemate and lead to father/son reconciliation was not unreasonable. The court did not abuse its discretion in modifying the visitation order on its own motion.

DISPOSITION

The visitation order is affirmed.

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MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.